

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





76-2135

No. 76-2135

To be argued by  
ALLAN M. PALMER

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 76-2135

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WILLIE ABRAHAM,

Appellant,

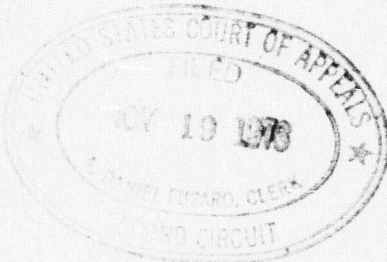
v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal From The United States District Court  
For The Southern District of New York.  
(76 Civ. 978)

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BRIEF FOR APPELLANT  
\_\_\_\_\_



Morton Katz  
Of Counsel

Allan M. Palmer  
1707 N Street, N.W.  
Washington, D.C. 20036  
(202) 785-3900

Counsel for Appellant



## TABLE OF CONTENTS

	<u>Page</u>
Issues Presented for Review . . . . .	iii
Statement of the Case . . . . .	1
1. Introduction . . . . .	1
2. The Issue As Framed Below . . . . .	2
Point I - Appellant was prejudiced by counsel's conflict of interest generated by a single law firm representing six defendants in a narcotic conspiracy case . . . . .	38
Point II- Appellant did not effectively waive his right to be represented by unbiased counsel . . . . .	46
A. Assuming arguendo that appellant's waiver of the conflict of interest on November 22, 1972, was facially valid, it was nonetheless involuntary as a matter of law . . . . .	46
B. Under the extant circumstances, the purported waiver was invalid on its face . . . . .	52
Point III- Even if the waiver of November 22, was valid, the later accruing prejudice to appellant rendered it of no legal moment . . . . .	57
Conclusion . . . . .	61

## TABLE OF CASES

<u>Crawford v. United States</u> , 519 F.2d 347 (4th Cir. 1975) . . . . .	49
<u>Mosher v. Lavellee</u> , 491 F.2d 1346 (2d Cir. 1974) . . . . .	49
<u>Olmstead v. United States</u> , 277 U.S. 438 (1928). . . . .	40
<u>Trotter v. United States</u> , 359 F.2d 419 (2d Cir. 1966) . . . . .	49



	<u>Page</u>
<u>United States v. Alberti</u> , 470 F.2d 878	
(2d Cir. 1972) . . . . .	52
<u>United States v. Arredo-Sarmiento</u> , 524 F.2d 591	
(2d Cir. 1975) . . . . .	52, 53
<u>United States v. Badalamente</u> , 507 F.2d 12	
(2d Cir. 1974) . . . . .	38, 52
<u>United States v. Carrigan</u> , Docket Nos.	
74-2056, 74-2057 (2d Cir. Nov. 3, 1976) . . . . .	38, 52, 53, 61
<u>United States v. Cirillo</u> , 499 F.2d 87	
(2d Cir.), cert. denied, 419 U.S. 1056 (1974) . .	39
<u>United States v. DeBerry</u> , 487 F.2d 448	
(2d Cir. 1973) . . . . .	52
<u>United States v. Easter</u> , 539 F.2d 633	
(8th Cir. 1970) . . . . .	60
<u>United States v. Garcia</u> , 517 F.2d 272	
(5th Cir. 1975) . . . . .	53
<u>United States ex rel. Hart v. Davenport</u> ,	
478 F.2d 203 (3d Cir. 1973) . . . . .	45
<u>United States v. Lovano</u> , 420 F.2d 769	
(2d Cir.), cert. denied, 397 U.S. 1071 (1970) . .	38
<u>United States v. Manfredi</u> , 488 F.2d 588	
(2d Cir. 1973) . . . . .	40
<u>United States v. Mari</u> , 526 F.2d 117	
(2d Cir. 1975) . . . . .	38, 52
<u>United States v. Morell</u> , 524 F.2d 550	
(2d Cir. 1975) . . . . .	48
<u>United States v. Olsen</u> , 453 F.2d 612	
(2d Cir. 1972) . . . . .	45, 46
<u>United States v. Principie</u> , 531 F.2d 1132	
(2d Cir. 1976) . . . . .	40
<u>United States v. Quintana</u> , 508 F.2d 967	
(7th Cir. 1975) . . . . .	39
<u>United States ex rel. Robinson v. Housewright</u> ,	
525 F.2d 988 (7th Cir. 1972) . . . . .	46
<u>United States v. Sheiner</u> , 410 F.2d 337	
(2d Cir. 1969) . . . . .	52
<u>United States v. Simpson</u> , 436 F.2d 162	
(D.C. Cir. 1970) . . . . .	49
<u>United States v. Sisca</u> , 503 F.2d 1337	
(2d Cir.), cert. denied, 419 U.S. 1008 (1974) . .	42, 43, 44, 60
<u>United States v. Sisca</u> , 361 F. Supp. 735	
(S.D.N.Y. 1973) . . . . .	39, 41
<u>United States v. Vowteras</u> , 500 F.2d 1210	
(2d Cir. 1974) . . . . .	52, 58
<u>United States v. Wisniewski</u> , 478 F.2d 274	
(2d Cir. 1973) . . . . .	52



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Docket No. 76-2135

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Willie Abraham,

Appellant,

v.

United States of America,

Appellee

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BRIEF FOR APPELLANT

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Issues Presented For Review

1. Was Willie Abraham prejudiced by trial counsel's failure to file a timely critical motion in aid of the defense, when failure to file that motion was the product of a conflict of interest generated by a single law firm representing six defendants in a narcotic conspiracy case?
2. Did Willie Abraham waive the conflict of interest, when the answers he gave at a purported waiver hearing had previously been fed to him by counsel having the conflict of interest?
3. Under the circumstances, was the waiver invalid on its face?
4. Assuming the validity of the waiver at the time, did not the later accruing prejudice to Willie Abraham avoid that waiver?

## STATEMENT OF THE CASE

### 1. Introduction.

On October 16, 1972, a three count indictment was filed in the court below in 72 Cr. 1159, charging Willie Abraham and seventeen other defendants with narcotic law violations. More specifically, petitioner-appellant was charged with conspiring to distribute narcotics, use of the telephone for such purposes and managing a continuing narcotics criminal enterprise in violation of Title 21, United States Code, Sections 846, 843 and 848, respectively. Trial to a jury commenced on January 16, 1973, and concluded on February 23, 1973, before United States District Judge Frederick van Pelt Bryan with a verdict of guilty as to Abraham and nine of the defendants then remaining in the case. On June 26, 1973, Judge Bryan sentenced Willie Abraham concurrently on each count to fifteen years on count one, four years on count two and life imprisonment on count three. On May 10, 1974, this Court affirmed the judgment of conviction and a petition for a writ of certiorari was denied. Those decisions are reported as United States v. Sisca, 503 F.2d 1337 (2d Cir.), cert denied, 419 U.S. 1008 (1974).

On March 1, 1976, Willie Abraham filed a motion in the court below to vacate his sentence pursuant to Title 28, United States Code, Section 2255, seeking redress on the theory that a conflict of interest by trial counsel resulted in his ineffective representation at a critical stage in the criminal proceedings. (76 Civ.



978.) Pursuant to a notice of hearing dated April 15, 1976, (J.A.51), <sup>1/</sup> United States District Judge Dudley B. Bonsal, conducted an evidentiary hearing relative to the motion on May 25, 1976. <sup>2/</sup> After various post hearing pleadings were filed by the litigants, Judge Bonsal issued a memorandum opinion on September 13, 1976, denying, inter alia, Willie Abraham's motion to vacate his sentence in 72 Cr. 1159. <sup>3/</sup> This appeal followed.

2. The Issue As Framed Below.

In seeking collateral relief, Willie Abraham alleged that at the trial of the underlying criminal cause he, along with Alphonse Sisca, Erroll Holder, Walter Grant, Robert Hoke and Margaret Logan were jointly represented by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman. They were also thus represented at the appellate level except for the representation of Erroll Holder by John L. Pollok, Esq., who had by that time left the firm. (J.A.1-2)

<sup>1/</sup> J.A. refers to the separate Joint Appendix of the pleadings below.

<sup>2/</sup> The hearing joined one Erroll Holder, a defendant in 72 Cr. 1159 who also filed a motion to vacate his sentence. (76 Civ. 1424)

<sup>3/</sup> Judge Bonsal's memorandum opinion joined two additional parties who were also defendants in the prior criminal case, and who filed similar collateral attacks subsequent to the hearing of May 25, 1976. Those petitioners were Walter Grant (76 Civ. 2598) and Robert Hoke (76 Civ. 2597), whose requests for relief were also denied. (J.A.87)



On November 17, 1972, the Assistant United States Attorney in charge of the prosecution, W. Cullen MacDonald, Esq., filed, an affidavit and memorandum of law seeking to resolve an apparent conflict of interest generated by the representation of six co-defendants in a narcotic conspiracy case by one law firm.<sup>4/</sup> In his affidavit Mr. MacDonald noted that a waiver concerning a possible conflict of interest was apparently "not possible" unless independant counsel participated in that decision.

"Indeed, the very fact of the same counsel's representation of successive links in a chain narcotics conspiracy could well inhibit the kind of frank disclosure necessarily a predicate to any informed legal judgment." (J.A.50)

In his supporting memorandum, Mr. MacDonald noted that:

"...it would seem clear that the six jointly represented defendants form at least three successive links in the distribution chain and perhaps more. Such varying roles give rise to interests which differ so significantly that multiple representation is, as hereinafter pointed out, inadvisable to say the least." (J.A.42)

The government felt so strongly about this matter, that it took the position in the Argument portion of its memorandum that "[t]he representation of multiple defendants at successive stages in a narcotics distribution chain without any waivers, involves a conflict of interest as a matter of law." (J.A.43)

Pursuant to these government pleadings, Judge Bryan held a hearing on November 22, 1972, to resolve the issue thus raised. Gino Gallina, Esq., represented all six of the

<sup>4/</sup> Hereinafter referred to as the "Gallina" firm.



defendants seemed to have conflicting interests at that hearing.<sup>5/</sup> The following transcript references track the purported waiver by Mr. Abraham at that time:

"THE COURT: All right.

First of all, I am going to call up these defendants one at a time. I see no reason at this point why counsel should not be present when I talk with them.

First, Mr. Alphonse Sisca.

MR. GALLINA: Shall I leave the courtroom?

THE COURT: No, you can stay if you want to. I certainly do not know enough of the facts here to disclose anything that isn't fully disclosable in open court.

Step up here, Mr. Sisca. I would like to talk to you.

BY THE COURT:

Q Now, Mr. Sisca, you are a defendant here on this indictment.

A Yes.

Q And you know what you are charged with.

A Yes, sir, your Honor.

Q You are charged with various violations of the narcotics laws and conspiracy to violate the narcotics laws in conjunction with a number of other people.

Do you understand that?

A Yes, sir.

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<sup>5/</sup> The 48 page transcript of that hearing will be hereinafter referred to as "Tr.I."

Q I have got to tell you, Mr. Sisca, that it is sometimes very difficult indeed for a counsel who represents more than one defendant to take a position or to try a case or to ask questions which may hurt one defendant and not hurt the other which may be prejudicial to one defendant -- do you follow me?

A Yes.

Q --because of his concern with the other defendants. I am not casting any aspersion -- don't misunderstand me -- on Mr. Gallina's honesty or good faith. I am only saying to you that this is a dangerous thing from the standpoint of the individual's rights. You have a perfect right to have any counsel of your own choosing, but you have got to select him with full understanding of the possibilities that may develop.

You heard, for instance, what Mr. McDonald said, the United States Attorney, did you not?

A Yes.

Q You heard him outline something about what may be the proof in this case, what the Government may try to offer. Do you understand the dangers of a conflict of interest here fully?

A Yes, your Honor.

Q And you have considered the whole question of whether you wish to continue with a lawyer who represents a number of other defendants whose interests may specifically or generally be in conflict with your own?

A Yes, your Honor.

Q What is your decision on that, sir?

A That I intend to keep Mr. Gallina as my attorney.

Q With the other defendants?

A Yes.

Q All right, you may sit down for the moment and we will discuss it a little further.

A Thank you.



THE COURT: Next, Mr. Willie Abraham.

BY THE COURT:

Q Mr. Abraham, I'm sure by now you understand the nature of the charges against you.

You are charged with conspiracy to violate the narcotics laws and violation of the narcotics laws and also, in a separate count, with the very serious offense of having engaged in massive activities of this nature in interstate commerce which might subject you, if you were convicted, to a sentence of life imprisonment.

Do you understand that?

A Yes.

Q Now, you heard what I said to Mr. Sisca, did you not?

A Yes, sir.

Q I don't think it is necessary to repeat to you everything I said to Mr. Sisca, except to say to you that there is this possibility of a conflict of interest:

There is the possibility of a situation developing during the trial in which the best protection of your interests may be different from the protection of the interests of one or more of your co-defendants who is represented by the same counsel.

Do you understand that?

A Yes, sir.

Q And you, as I say, have the absolute right to have counsel of your own choosing. Do you understand that?

A Yes.

Q But, on the other hand, you are entitled to separate and individual counsel if you want it. If you don't want it, you can only have the Gallina firm representing you and the other defendants if you are fully cognizant and you are fully aware of the possibilities of conflict of interest and you of your own free choice and will decide to continue with them. Do you understand that?

A Yes.

Q With that in mind, what is your desire?

A I would like to keep Mr. Gallina.

Q You want to keep the Gallina firm?

A Yes.

Q Despite the fact that they may be representing other co-defendants and a conflict of interest may develop?

A Yes, sir.

THE COURT: All right, you may sit down, Mr. Abraham for the moment."

\* \* \* \*

"THE COURT: With reference to Messrs. Sisca, Abraham, Holder and Grant, will each of you answer this question: Gentlemen, have any threats or pressures been put on you to stay with Mr. Gallina's firm?

DEFENDANT SISCA: No.

DEFENDANT ABRAHAM: No.

DEFENDANT HOLDER: No.

DEFENDANT GRANT: No."

\* \* \* \*

"THE COURT: Will all of the six defendants in the courtroom rise at this point? I am addressing this question to each one of you and I want an individual answer from each of you starting with Mr. Sisca.

Mr. Sisca, is your mind quite clear this morning?

DEFENDANT SISCA: Yes, sir.

THE COURT: Do you take drugs or have you at any point?

DEFENDANT SISCA: No, your Honor.



THE COURT: And you are feeling physically all right?

DEFENDANT SISCA: Yes, sir.

THE COURT: And your mind is quite clear?

DEFENDANT SISCA: Yes, sir.

THE COURT: I ask the same question of Mr. Abraham.

DEFENDANT ABRAHAM: Yes, sir.

THE COURT: Do you take drugs at any point?

DEFENDANT ABRAHAM: No.

THE COURT: Is your mind quite clear this morning? You are feeling physically all right?

DEFENDANT ABRAHAM: Yes, sir.

THE COURT: The same question of Mr. Holder.

DEFENDANT HOLDER: Yes, sir.

THE COURT: With the same answer?

DEFENDANT HOLDER: Yes, sir.

THE COURT: The same question to Mr. Grant.

DEFENDANT GRANT: Yes, sir, your Honor.

THE COURT: Is that your answer to the question, or what is your answer to the question?

DEFENDANT HOLDER: Yes, your Honor, that is my answer to the question.

THE COURT: Your mind is quite clear? There are no drugs involved in your situation or anything like that that might obscure your thinking; is that correct?

DEFENDANT GRANT: Yes, sir.

THE COURT: Mr. Hoke, is your mind clear this morning?

DEFENDANT HOKE: Yes.

THE COURT: You are feeling physically all right?

DEFENDANT HOKE: Yes.

THE COURT: And you haven't any drug problem that might affect your thinking or cloud your thinking?

DEFENDANT HOKE: No.

THE COURT: What about you, Miss Logen? (sic)

DEFENDANT LOGEN: Yes, your Honor.

THE COURT: Is your answer the same?

DEFENDANT LOGEN: Yes.

THE COURT: Have you any drug problem ?

DEFENDANT LOGEN: No.

THE COURT: So your mind is quite clear and you are feeling physically all right this morning?

DEFENDANT LOGEN: Yes, your Honor.

THE COURT: I am going to say this to each of the defendants: I want you to understand that by taking the position that you do this morning, that you want to continue with the Gallina firm representing all six of you, despite what we talked about here earlier, that you are doing this for good. You are committing yourselves now and you are never going to be able to raise this question on appeal or any other time if something develops during the trial that is unfavorable to you. You have elected to keep the Gallina firm; do you understand that?

(Defendants answered in the affirmative.)

THE COURT: Do you understand that when the trial is over I am not going to have people coming back to me then and saying: "I didn't like my counsel. I didn't like the way he represented me. I didn't like the way he represented me either."



You've got to fish or cut bait for good, you understand.

(Defendants answered in the affirmative.)

THE COURT: I think you all understand, but I will ask each of you.

Do you want to continue with the Gallina firm, Mr. Sisca?

DEFENDANT SISCA: Yes.

THE COURT: Mr. Abraham, do you want to continue with the Gallina firm?

DEFENDANT ABRAHAM: Yes, your Honor.

THE COURT: Mr. Holder?

DEFENDANT HOLDER: Yes, your Honor.

THE COURT: You want to continue with the Gallina firm?

DEFENDANT HOLDER: Yes.

THE COURT: Mr. Grant, do you want to continue with the Gallina firm?

DEFENDANT GRANT: Yes.

THE COURT: Mr. Hoke, what do you say?

DEFENDANT HOKE: Yes.

THE COURT: And Miss Logen?

DEFENDANT LOGEN: Yes.

THE COURT: All right, you may sit down."  
(Tr. I, 22-26, 31-37)

At the conclusion thereof, Judge Bryan held that all six of the defendants had "elected to continue to have Mr. Gallina's firm represent them. The only thing I can do with



such a free election is to recognize their right to make such a free choice and I will permit them to do so." (Tr. I, 43.)

In support of his motion to vacate sentence, Mr. Abraham submitted an affidavit in which he alleged that his arrest on December 15, 1971, for New York State narcotic law violations triggered the indictment in 72 Cr. 1159. Participating in that arrest were state and federal law enforcement officers who questioned him about Alphonse Sisca, among others, concerning narcotic traffic. Mr. Abraham was informed that if he cooperated with the authorities, he would receive little or no jail time, if he did not, he would be incarcerated for a long time. On the same day of his arrest, attorney Gino Gallina came to talk with him at the precinct on the suggestion of Alphonse Sisca and others, in order that Mr. Gallina could represent Mr. Abraham. Prior to that date, the latter had never known or seen Mr. Gallina. After his release on bail, Mr. Gallina told Mr. Abraham to "keep quiet and not inform on anybody." (J.A.26)

On the morning of November 22, 1972, Mr. Abraham along with co-defendants Walter Grant, Robert Hoke, Erroll Holder and Margaret Logan met with Mr. Gallina at the latter's office. Alphonse Sisca was not present. They were advised that the government was trying to hurt the defense by splitting these defendants and their counsel apart:



"We were told that we were going to Court and that the Judge was going to ask us questions about whether or not we wanted new lawyers and we were instructed to say that we understood what the Court was telling us, but that we all wanted to stay with the Gallina firm. That is exactly what I did when asked the questions by the Court on November 22, 1972. I did so because I thought the government was trying to trick us out of beating the case.

At no time before or during the hearing of November 22, 1972, did Mr. Gallina advise me or anybody else what a conflict of interest was, how it might come up in this case or how a conflict of interest could lead to a bad defense for me. At no time before or during the hearing did Mr. Gallina show us the affidavit or motion filed by the government concerning a conflict of interest or read it to us or otherwise explain it. Before and after November 22, 1972, affiant had no personal knowledge of what a conflict of interest was, or how it could specifically come up in this case.

Because of counsel's advice I was afraid of being convicted if anyone else but Mr. Gallina and his law firm represented us in this case and for that reason and that reason alone told the court that I wanted to keep the Gallina firm on November 22, 1972." (J.A.27-28)

In further unfolding the machinations he now perceived with the aid of new and independent counsel, Mr. Abraham summarized the relevant facts in 72 Cr. 1159 from the appellate briefs of the parties and the opinions of the trial court and this Court. 361 F.Supp. 735 (1973); 503 F.2d 1337 (1974). That summary -- whose accuracy was not challenged by the government below -- is as follows:

"The dominant legal issue was whether or not a waiver of the minimization question had occurred because of it being raised after commencement of the trial. The Court of Appeals specifically declined to rule on whether minimization had occurred and the appropriate remedy to pursue for a failure to minimize (503 F.2d 1346). The Court affirmed that aspect of



the judgment below holding that the defendants had knowingly waived their rights to challenge the admissibility of the wiretap evidence in that they deliberately failed to raise the claim of failure to minimize in a pretrial motion although specifically directed to do so by Judge Bryan.

The trial court had additionally held that the minimization requirements had not satisfactorily been complied with, but that the 42 calls admitted at trial fell within the intercept order and should therefore, not be excluded from evidence. 361 F. Supp at 745-748.

The Court of Appeals was particularly sensitive to the timeliness of motions to suppress, for such intentionally tardy motions could effectively bar the government from appealing an adverse ruling. Furthermore, such tardiness coupled with an order suppressing the evidence could prevent the government from properly presenting its case to the jury.

'Perhaps of chief importance, the timely disposition of such motions is critical to the orderly and fair administration of the criminal justice system itself. We will not countenance such deliberate and subtly disruptive tactics as those employed here.' 503 F. 2d at 1349.

The trial court also alluded to the detriment accruing to the government by the mid-trial filing of these motions including, inter alia, the denial to the government of an opportunity to determine what evidence it can or cannot adduce at the trial in the light of the court's pretrial rulings; and, whatever legal consequences in terms of the due process and double jeopardy clauses of the Constitution may result from the impanelment of the jury. 361 F. Supp. at 740.

These considerations can often be compelling especially when they intertwine as appears to be the case here, i.e. "[t]he evidence [was] derived largely from wiretaps and their fruits...." 503 F. 2d at 1339.

Of the 42 conversations admitted at trial, many were attributed to petitioner while only four of them were allegedly participated in by Alphonse Sisca who, along with Benjamin Castalozzo, were the top links between



unknown sources and the day to day operations directed by petitioner, i.e., Sisca and Castalozzo were petitioner's suppliers. 503 F. 2d at 1339-1341.

At trial, counsel for defendant Sisca presented four voice identification experts who testified that the four telephone conversations attributed to Sisca, were not made by him. The jury acquitted Sisca of use of a telephone to further narcotic law violations.

On December 13, 1971, Sisca allegedly called petitioner and agreed to meet at 5:00 p.m. at the same place. Abraham was followed to the meeting place where he was seen meeting with Sisca and Castalozzo. Counsel for Sisca presented two lighting experts who

'analyzed the lighting and street conditions in existence at the Albert Einstein Hospital, where the meeting took place, and along the departure route followed on December 13, 1971, and expressed their opinion that all three officers observations should be rejected, including particularly the testimony positively identifying Sisca in the passenger seats of both the Abraham and Costalozzo automobiles.' Government's brief on appeal at page 12.

Counsel for Sisca also presented a partial alibi witness for the jury concerning the night of November 15, 1971.

Defendant Hoke presented a partial alibi defense. Eugene Rainey, a bartender, testified that Hoke left his bar at 4:30 a.m. on December 15, 1971, in an intoxicated state. Hoke's teenage son testified that he was awakened by his father and mother arguing at their home at 461 Olmstead Avenue, at approximately 5:00 a.m. that morning. The other four defendants -- including petitioner -- who were represented by the same law firm as Sisca and Hoke presented no evidence and all six of them did not testify at trial." (J.A.7-10)

Upon the basis of these allegations petitioner-appellant urged that he was prejudiced by the conflict of interest and that there was no effective waiver of that conflict because:



A. The representation by the Gallina firm of the six defendants infected the purported waiver hearing itself, and rendered it a sham proceeding because of the importunings by Mr. Gallina leading to the defendants mouthing the answers he had previously fed to them.

B. Even on the face of it, in light of the emergent standards necessary to effect an intelligent waiver of a conflict of interest, no valid waiver can be deemed to have occurred at the hearing of November 22, 1972.

Responding to this assault upon the conviction, the government urged that the petition should be dismissed without a hearing in that a valid waiver was effected before Judge Bryan in 1972, and because petitioner's affidavit failed to establish that some different standard of inquiry should have been undertaken at that time. Furthermore, prejudice had not been shown.

Unimpressed, Judge Bonsal ordered a hearing "for the limited purpose of taking evidence on the issue of whether the petitioners gave an informed consent to being represented at trial by the law firm of Lenefsky, Gallina, Mass, Berne and Hoffman." (J.A.52)

Prior to that hearing of May 25, 1976, petitioner, by subpoena dated April 30, 1976, sought to secure from the United



States Attorney for the Southern District of New York or his authorized representative all records, notes, transcripts and memoranda concerning:

1. The naming of Gino Gallina, Esq., as an unindicted co-conspirator in the case of U.S. v. Magnano, et al., 75 Cr. 687 (S.D.N.Y.) whereby Mr. Gallina allegedly attempted to collect \$200,000 in narcotic monies for a narcotic dealer.
2. The allegation by Assistant United States Attorney Dominic Amorosa in his affidavit filed in the Magnano case, supra, on January 26, 1976, that a witness had told the prosecutor that a narcotic dealer represented by Mr. Gallina i.e., Zack Robinson, had stated that he had used Mr. Gallina and his investigators to obtain information necessary to carry out murders against adverse witnesses. And, to provide us with the names of the two other witnesses against Mr. Robinson who had been murdered in addition to one Marjorie Morris.
3. Attempts by federal authorities to enlist Mr. Abraham's cooperation between his initial arrest and trial.
4. All information, including intercepts, to the effect that Mr. Gallina received a cash fee in 72 Cr. 1159 of approximately \$300,000.



5. All other information helpful to the defense in its cross examination of Mr. Gallina. (J.A.53-54)

At the hearing before Judge Bonsal, Willie Abraham testified that he was arrested in connection with the underlying facts of 72 Cr. 1159 on December 15, 1971, by a task force comprised of state and federal personnel for a local narcotic charge and taken to a precinct in the Bronx.<sup>6/</sup> Four or five hours later Mr. Gallina visited him there, and stated that Mr. Sisca had sent him; prior to this occasion, Mr. Abraham did not know this attorney. Bail for Mr. Abraham was set in the amount of \$150,000 and he gave Mr. Gallina written authorization to go to a safe deposit box and remove the funds therein so that bail could be secured and the attorney fee paid. Mr. Abraham testified that Mr. Gallina removed \$270,000 from the safe deposit box.

Later on in the proceeding when questioned about this, Mr. Gallina admitted going to the safe deposit box and collecting money, but refused to testify about how much money he had gotten therefrom.

"Q. Are you taking the Fifth Amendment on that question, I take it?

A. Whatever rights -- the Sixth Amendment rights, Fifth Amendment rights, First Amendment rights, Second Amendment rights." [Tr. II, 116]

<sup>6/</sup> The 190 page transcript of that hearing will hereinafter be referred to as "Tr. II".



After being released on bail on December 21st, Mr. Abraham was rearrested by the Task Force the following morning and taken to Foley Square where he was questioned about Alphonse Sisca and Arnold Squitteri. Bail was set at one-half million dollars and Mr. Abraham remained incarcerated in lieu thereof until sometime in February of 1972. During that period of incarceration he was importuned by various government agents to cooperate with them. He was also advised by an Assistant United States Attorney, Mr. Walker, that in order to cooperate with the Government he would have to leave Mr. Gallina's firm, because the prosecutor feared that Mr. Gallina had some involvement in the activities of the people they sought to question him about. (Tr.II, 10-14)

The government never sought to controvert these assertions and indeed, when discussing that aspect of our subpoena seeking material in the government files helpful to our cross-examination of Mr. Gallina, Assistant United States Attorney Richard Weinberg in resisting disclosure cryptically asserted:

"The Government has in its file -- and I cannot specifically enumerate what they are because I don't know -- but I know we must have in our files certain information concerning Mr. Gallina, and they concern, possibly concern on-going investigations." (Tr.II, 177)

During this period of incarceration one Leslie Coombs was arrested in Westchester County. Mr. Coombs had been a client of Mr. Gallina's, but he suddenly changed lawyers and Mr. Gallina told appellant that he believed that Mr. Coombs was an informant in the case and "if it wasn't for Mr. Coombs, there



wouldn't be any charges against me, any case against me." (Tr.II, 15) He also stated that if Mr. Coombs was not there to testify, the government would not have a substantial case and he would move to have the complaint dismissed on speedy trial considerations. While Mr. Abraham was thus incarcerated, Mr. Coombs was shot twice in the head and the complaint against Mr. Abraham was subsequently dismissed.<sup>7/</sup> Mr. Abraham was again arrested in October of 1972, after the indictment was filed on October 16, 1972, in 72 Cr. 1159. He remained incarcerated until November 21, 1972, one day before the conflict of interest hearing before Judge Bryan. Once again during this period of incarceration the government sought out his cooperation. He was further informed by the federal authorities that if he did cooperate, he would have to discharge Mr. Gallina. They were afraid that if Mr. Gallina found out he was an informer, there might be danger to him and his family. Mr. Abraham believed this to be true because of what had happened to the former Mr. Coombs. He related these conversations concerning attempts to have him inform to Mr. Gallina, who told him to string the government along.

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<sup>7/</sup> In its opinion, this Court noted at footnote 6 in alluding to an organizational accounting record: "the last entry referred to a deceased co-conspirator, Melvin Coombs..." 503 F.2d at 1342.



Mr. Abraham was notified to be at Mr. Gallina's office on the morning of November 22, 1972, because the "Government had filed some motions and that we were going to have a hearing." (Tr.II, 25) He was present that morning along with the other defendants represented by the Gallina firm except for Mr. Sisca, who was not there. (Tr.II, 21-25)

"Q And tell us what occurred then, sir.

A Mr. Gallina said that the Government had filed a motion to split us up from the firm and that the Government felt that if they could split us up they might have a chance of getting someone to inform. Therefore, they would make the Government case much stronger and that he wouldn't know what the other one was doing.

So what he suggested is that no matter what happened or what takes place or what questions, the answer was to stay with the firm, and any answer that would keep us with the firm, those were the answers we were supposed to give.

Q Did he indicate anything about why the Government's case was weak?

A Yes. He said that the only thing the Government had was the wire tap and that he had listened to enough tape to know that there was no minimization on the wire tap, and he felt that he could beat it on a wire tap, but if they had an informer, the wire tap wouldn't be necessary.

THE COURT: This is what Mr. Gallina was telling you?

THE WITNESS: Yes.

THE COURT: When did you say this meeting was, sir?

THE WITNESS: On the 22nd.

THE COURT: Where was it?

THE WITNESS: In his office.

THE COURT: Do you remember where that was?

THE WITNESS: I think it was 51 Chambers Street.

THE COURT: And were the only people present you and these gentlemen you have mentioned and Mr. Gallina?

THE WITNESS: Yes.

Q. What time was that meeting, sir?

A. I would say between eight and nine. I don't know exactly what the time was.

Q. At that time, sir, did Mr. Gallina show you the motion or affidavit or any pleadings filed by the Government?

A. No; he did not.

Q. As far as you understood, why were you going to court that day?

A. For a hearing. Conflict of interest.

Q. Did he explain to you fully what a conflict of interest was?

THE COURT: Wait a minute. Please don't lead your witness this way.

You say he mentioned there was going to be a hearing on conflict of interest?

THE WITNESS: Yes.

THE COURT: Tell us what he said.

THE WITNESS: He said there was going to be a hearing on conflict of interest to remove us from the firm and any answer that we give was supposed to be an answer so that the Judge could let us stay with his firm.



THE COURT: Is that all he said, as far as you remember?

THE WITNESS: Yes; that's all.

THE COURT: That's about all he said?

THE WITNESS: Yes.

Q Was anything else said at that time?

A No more than what I have already said.

Q Was there any reason given why to stay with the firm?

A Yes: so that he would know what each defendant was doing. (Tr.II, 26-28)

Accordingly, the answers he gave to Judge Bryan were predetermined by the advice Mr. Gallina had given to the defendants in his office right before the hearing. (Tr.II, 30-32) These same assertions were echoed by Mr. Gallina when he appeared before Judge Bryan on November 22, 1972:

"This is not the first time that these clients of mine have been approached by the Government and have been asked and/or been told that they should have other counsel. They were told that at the time of their original arrest. They were told that by agents who visited them in the Tombs, even though I informed the Government again and again that I did not want them questioned. Agents visited these clients of mine at various places of incarceration and told them that they -- "We will provide you with counsel. We will get lawyers for you."

THE COURT: Who do you mean by 'we'?

MR. GALLINA: 'We, the Government, we'll see that you get lawyers. We have about a hundred lawyers who we can pick who we know will work with the Government.'

In other words, seek cooperation from the Government and get rid of your attorney, or your attorney is not out for your interest.



These were not only lawyers but narcotics agents and New York City policemen. There has been a tremendous effort in this case in the last year to get these defendants to buy it in a legal sense to prevent them from being represented by one firm.

Why, I ask you? The Government knows that it is to its disadvantage to have the defense coordinated here. Note, your Honor, from the chart we have prepared that it is not a chain that these defendants --

THE COURT: What are the charges?

MR. GALLINA: They are charged with a conspiracy and the use of a telephone and some of the defendants are also charged with, I think, the continuous business of narcotics. Some of them are, some of them aren't. There are various counts.

There are other groups of defendants under the same indictment. There is a group of defendants under a person by the name of Sizemore and that is one link of the chain. This group of defendants are alleged to be a single link of a total chain. There are probably five or six other groups represented by other attorneys in this very case.

There is Williams, Pat Rich, Tommy Rich, McBride, et cetera, who are individuals who are alleged to have separate branches or spearate links in the chain.

Now, it is to their advantage, I think, for them to be represented by a separate attorney and I believe that the conflict between this group and that group might be inseparable. But this group, its defense, in view of the fact that they allege they are not guilty, their defense will be powerful by virtue of the fact that it is a coordinated defense, and I assume, I don't think the Government wishes it.

I think my clients will bear with me. The Government wants to divide the defendants. It is a very weak case with very little evidence against certain defendants and they feel that if they can divide the defendants they may be able to perfect their case through cooperation from certain defendants. Not that I in any way nor would my law firm recommend to any of these defendants that we obstruct justice and avoid allowing some defendants to help the Government if they so desire.



These defendants have continuously asserted the fact that they are not guilty, that they are not involved in this case, that they are innocent, and that they want to stand on their rights and let the Government prove the case against them.

\* \* \* \*

"MR. GALLINA: Just factually, through no fault of his own, I must say that counsel for the prosecution is not aware of certain things. I would point out that in January of this year, the morning after some of these defendants were released on bail from a Bronx arrest, they were rearrested by Federal authorities -- and the Assistant at that time was John Walker -- on a duplicate of the charges in this case. They were subsequently dismissed some weeks later, for what reason, I don't know, but they were subsequently dismissed.

I can give your Honor a simple example of what happened on that day. Mr. Abraham was supposed to appear in Bronx Court pursuant to the appointment date for the calendar call. When he didn't appear, my investigators had told me -- they were supposed to pick him up at his residence. They told me as they arrived they saw a number of agents picking him up and taking him somewhere, and I immediately inquired around the city as to who had him in custody. Everybody denied having him in custody, New York City, the Bureau of Narcotics, the FBI, everybody.

There had been, while Mr. Abraham was in the Bronx House of Detention, a detainer. It had been signed by John Walker at two in the afternoon. I had a little bit of a brainstorm and I said, maybe Mr. Walker would know about his whereabouts because he had intended to detain my client who was on a State charge in the Bronx House of Detention.

I called Mr. Walker at 2 o'clock, 1.30. He denied any knowledge of where my client was. I called him and I said, 'I think it has something to do with the Bureau of Narcotics. I brought it to your attention since you had previously been assigned to this case and you had submitted the writ.'



I called him around four. I called him around five. I called him at six. He was still in. We, being a firm of seven former prosecutors who just recently left the office, knew that hours usually terminate around five o'clock and what is a young prosecutor doing in the office around seven.

I called him at seven. He denied any knowledge as to the whereabouts of my client. Mr. Byrnes, Mr. Hoffman and myself, three former prosecutors, were waiting. We entered the building to the back area, waited, and then walked through as if we belonged in the building. We walked towards Mr. Walter's office. We heard shouting and yelling. We opened the door and said "Surprise." We opened the door. There was Mr. Abraham and Mr. Walker and 15 agents from the Task Force. He had been there all day long.

THE COURT: Mr. Abraham?

MR. GALLINA: Yes.

Regardless of statements they may have taken and rights they would have violated. One refrain that was continually pointed at Mr. Abraham's head -- they had months and months of visiting in the Bronx House of Detention and while he was at West Street -- 'We will get you an attorney; we will get you an attorney.'

Again and again they said this to Mr. Abraham that day and he was visited in West Street and he was told that by agents and all these visits must be on the record. He was visited also in the Bronx House of Detention. I personally saw them visit him once in the Bronx House of Detention, because I arrived at the same time the officers had arrived. They had just left him and again said, 'Get another attorney.' He showed him how he could open the gate and let him out of the building if he would get another attorney.

I suspect the Government's attorney in making the application here to your Honor today. I suggest that you may ask my client concerning his desire to be represented by my law firm and have the defense coordinated in the fashion which I stated. I am also heartily in accord that your Honor, if you so desire, appoint counsel to speak to them and indicate to them any conflict position and listen to their judgments after having been spoken to.



But I think your Honor should be aware of the fact pattern here. I do suspect the Government's motives. I think the Government's motives are based on the fact that they have a very weak case. They feel the only way to win it is to divide the defendants." (Tr.I, 14-16, 19-22)

Although Mr. Gallina admitted -- as indeed he must -- at the hearing of May 25, 1976, that he made these assertions to Judge Bryan on November 22, 1972 at 10:45 a.m., he denied telling this to the defendants not more than an hour before.

"Q So you never advised Mr. Abraham that they had a weak case against them and that you feared an informant would come forth if the defendants were divided?

A As to Mr. Abraham, no; he was never advised it was a weak case. He couldn't possibly have been ever advised. It would boggle the mind to say that to him. He was caught with narcotics. He was throwing narcotics out of the car window. There were independent witnesses on the street who had seen the narcotics flying out of the car window. They had hundreds and hundreds of phone calls.

I would never have said this is a weak case against Mr. Abraham.

Don't forget, when I was in court in the sense I may have been thinking also of other people's cases, not just his.

Q You also told Judge Bryan, at page 16 of the transcript, 'The Government wants to divide the defendants. It is a very weak case, with very little evidence against certain defendants, and they feel if they can divide the defendants, they may be able to perfect their case through cooperation from certain defendants.'

A Your voice dropped at a certain -- it's a very weak case --

Q 'It is a very weak case, with very little evidence against certain defendants, and they feel, the Government, that if they can divide the defendants, they may be able to perfect their case through cooperation from certain defendants.'



You told that to Judge Bryan, didn't you?

A Yes.

Q Didn't you tell the same thing to the defendants?

A No. That wasn't the position that the defendants would take, and we wanted a coordinated defense." (Tr.II, 140-141)

As we observed earlier, the Assistant United States Attorney filed his affidavit and memorandum of law concerning the conflict question on November 17, 1972. At the May 25th hearing, Mr. Gallina testified that prior to the hearing on November 22, 1972, he met with Mr. Abraham and all of the defendants "on a number of occasions about the conflict issue." (Tr.II, 107-112)

"Q Do you recall who was present at these discussions?

A As I said, we had more than one occasion, so it would be varying numbers of the defendants in the case. Mr. Abraham, Mr.--he had a girl friend at the time, who was also a defendant in the case. She would usually be with him." (Tr.II, 107)

Mr. Gallina was quite certain and reiterated that he personally had conferences with Mr. Abraham concerning the conflict of interest question on a number of occasions between the filing of the motion and the hearing.

[B]ecause I had conversations with Mr. Abraham on a number of occasions, because I had conversations with him and Mr. Sisca concerning that, and some -- I know Mr. Abraham's girl friend would be there, and that there would be other defendants." (Tr.II, 134-135) Cf. Tr.II, 158-159.



This was, of course, totally untrue since, as Mr. Abraham had testified, he was incarcerated from October until November 21, 1972, the day prior to the hearing. (Tr.II, 19-20) This is corroborated by the hearing transcript before Judge Bryan. At page 4 thereof Assistant United States Attorney, Mr. MacDonald, observed that "a second matter. . . is Mr. Abraham's bail status. It has come to my attention this morning that late yesterday he was admitted to bail by the United States Magistrate. . ." Later on at page 47, Mr. MacDonald asserted that Mr. Abraham had been released "[Y]esterday at 5 o'clock." This fact was not disputed by the government below after we specifically alluded to it in our post hearing memorandum. (J.A.59)

Furthermore, Mr. Gallina denied under oath ever being directed by Judge Bryan to file a minimization motion pretrial and failing to do so.

"A We had not been so directed." (Tr.II, 129-130) He added that John Pollock, Esq. of his firm, had not given him a minimization motion for filing prior to the commencement of the trial. (Tr.II, 128-129)

This testimony was incredible in light of the fact that this Court has already branded Mr. Gallina's late filing of the motion as "deliberate and subtly disruptive tactics...." 503 F.2d at 1349. "Appellants. . . deliberately failed to raise the claim of failure to minimize in a pretrial motion



although specifically directed to do so." (503 F.2d at 1346, emphasis supplied.)

The absolute incontrovertibility of that assertion was demonstrated by the testimony of John Pollock, Esq., who stated that as a member of the Gallina firm he had drafted a minimization motion and had given it to Mr. Gallina pretrial for filing. (Tr.II, 87, 91-2.)

"Q At the trial itself, you made an objection based on minimization; is that correct?

A That's correct.

Q Orally?

A That's correct.

Q Were you surprised they had not been filed, sir?

A Yes.

Q Why?

A I assumed they had been filed." (Tr.II, 91-92)

\* \* \* \*

"A . . . [I]t was my understanding that the motions either were filed or were going to be filed prior to the trial." (Tr.II, 97.)

Furthermore, as we read the transcript of Mr. Gallina's testimony on May 25, 1976, we have counted some seventy-three instances during direct and cross examination where his memory failed him and he resorted to such phrases as I can't recall, I'm not certain, I don't believe so, etc., to answer the questions.



At the end of his testimony the cross examiner summed it up thusly:

"Q Is it a fair statement Mr. Gallina, your recollection of many of the facts and conversations at this point is quite vague?

THE COURT: I think that's fair. You said this quite a while ago. I think that's fair." (Tr.II, 171)

Although we will further summarize the hearing testimony as it unfolded, we have paused to demonstrate the total unreliability of Mr. Gallina's testimony because, neither the government in its post hearing memorandum nor the trial court in its memorandum opinion, sought to rely on that testimony. It would appear that for the reasons we have demonstrated and for others that remain buried in the files of the United States Attorney, government counsel -- in good faith -- did not seek to champion his cause with Mr. Gallina's aid. The trial court's ruling reflects the tenor of the government's position by basically relying on the 1972 hearing before Judge Bryan to make its judgment and not the one it conducted. The importance of this hesitancy to credit the Gallina testimony will become clear when we advance one of our major arguments concerning the "sham" nature of that proceeding before Judge Bryan.

Returning to the May 25, 1976, hearing, Mr. Abraham testified that, all in all, some \$300,000 had been turned over to Mr. Gallina. (Tr.II, 341).

On cross-examination government counsel mainly sought to rehash the questions and answers reflected in the 1972 hearing transcript before Judge Bryan. The entire examination was brief, consuming but nine pages of testimony. (Tr.II, 34-49) Mr. Abraham recalled answering "NO" to the question: "Have any threats or pressures been put on you to stay with Mr. Gallina's law firm?" (Tr.II, 35-36) On redirect, he explained that he answered the question in that fashion because of Mr. Gallina's earlier advice that morning.

"Q The answers that you gave in court that day, sir: were they similar (sic) or were they the product of your own thinking?"

A No, they were the product of what Mr. Gallina said, and my mind was already made up; no matter what the judge said, I would have still stayed with the firm." (Tr.II, 44)

Erroll Holder testified in a fashion similar to Mr. Abraham concerning what occurred in Mr. Gallina's office on November 22, 1972. (Tr.II, 50-55) At the trial, John Pollock, Esq. of the Gallina firm represented Mr. Holder. (Tr.II, 65) Two days prior to that trial there was a meeting in Mr. Gallina's office to assign various lawyers to the defendants; the witness did not recall Mr. Abraham being at that meeting however, because the latter came late. (Tr.II, 65, 71)

The government then called John Pollock, Esq., as a witness. In 1972, he was employed by the Gallina firm as an associate and represented Erroll Holder at the trial in question. Two or three days prior to the commencement of



trial he met with the defendants in his office. (Tr.II, 76-77) The witness could not say for certain when Mr. Abraham arrived at the meeting, but remembered that he was in the office at some point that morning. The meeting had been called to introduce Mr. Pollock and Mr. Kiernan, another associate to Mr. Holder and Mr. Hoke, "because we had been selected to represent them." (Tr.II, 78) In addition, he sought the meeting because he wanted to discuss:

"...the issue of conflict of interest, because I felt very strongly at that time that there was in fact a conflict of interest. . . .

"And it was my opinion that there were particularly strong conflicts of interest between Mr. Abraham and Mr. Hoke, his brother-in-law. . . .

"And I also felt that it was wrong for the law firm to represent six defendants." (Tr.II, 79-80)

The witness testified that he explained this conflict of interest to all the people present in the room, and they indicated that they understood the problem and wished to continue with the Gallina firm. (Tr.II, 80-81)

Mr. Pollock had joined the firm in May of 1972, and had worked on various motions for the case. Prior to that Saturday meeting two or three days before commencement of the trial, Mr. Pollock had never spoken to his new client Mr. Holder. (Tr.II, 81) Mr. Gallina who was the senior partner and had overall supervision of the case, asked him

to represent Mr. Holder. Mr. Pollock had also advised his client that he would file a pretrial motion to suppress based on minimization. Such a motion was drafted and given to Mr. Gallina who held off filing it. (Tr.II, 87, 91-92) At this point in the proceeding, although the matter had been tacitly understood, government counsel specifically narrowed the issue to whether or not a valid waiver had occurred.

"Q In any event, Mr. Pollock, I think you stated there was no doubt in your mind that a conflict of interest did exist in this case?

A No doubt.

Q And that conflict --

MR. WEINBERG: Your Honor, there is no dispute. The issue in this hearing is not whether there is a conflict. It is whether they voluntarily waived.

THE COURT: I understand that." (Tr.II, 90)

Furthermore, Mr. Gallina had never advised Mr. Pollock of the proceeding before Judge Bryan on November 22, 1972. The witness could not state that he recalled Mr. Abraham being present during that portion of the Saturday conference dealing with conflict of interest. (Tr.II, 93) Mr. Abraham was briefly recalled to indicate that he arrived late to the Saturday meeting and that it was over by the time he had gotten there. (Tr.II, 189)

Gino Gallina, Esq., testified that prior to the hearing before Judge Bryan, he met with Mr. Abraham and all of the defendants on a number of occasions and discussed the conflict



of interest problem with them. He stated that at these meetings with Mr. Abraham he specifically advised him as to the advantages and disadvantages of a joint representation. Mr. Gallina believed that a coordinated defense was to the defendants advantage. He denied giving any of the defendants specific instructions on how to answer Judge Bryan's questions at the hearing. (Tr.II, 107, 110-113) His entire direct examination by government counsel lasted for eight pages in the transcript. (Tr.II, 105-113) Much of the cross-examination has been alluded to earlier and we will not reproduce it again other than to state that it was a study in vagueness and patent untruths. We were also startled to hear Mr. Gallina invoke the protection of the 5th Amendment on three occasions when questioned about the money he recovered from Mr. Abraham's safe deposit box. (Tr.II, 116, 126, 181)

"Q Did you advise Mr. Abraham that the Government had a weak case against them?

A No. Mr. Abraham wanted to plead guilty continuously." (Tr.II, 136) (Mr. Gallina on May 25, 1976.)

"MR. GALLINA: If I may state to your Honor for the record, so that it is very clear, I have been very candid with these defendants. They have all insisted to me that they are not guilty of this charge. They are not just taking a technical position, but they are actually not guilty." (Tr.I,5) (Mr. Gallina on November 22, 1972).

And so it went. At the conclusion of his testimony, we brought up the issue of our subpoena duces tecum requests of the United States

"MR. PALMER: Paragraph 1, your Honor. Under Rule 608(b) of the new Federal Rules of evidence I believe you are allowed to inquire of witness as to specific instances of conduct not amounting to a conviction, to impeach his credibility.

We believe this line of inquiry goes to that.

MR. WEINBERG: Your Honor, if I may just very briefly speak on that item:

The fact Mr. Gallina was named an unindicted co-conspirator is a matter of public record. Mr. Palmer is aware of it. If he felt there was a question of any relevance to this hearing he could have asked it of Mr. Gallina when he was on the stand.

THE COURT: All he wants to do is -- I support your position on that, but you have no objection to his asking Mr. Gallina about this matter when he comes back on the stand?

MR. WEINBERG: No, your Honor, except to the extent of relevance.

THE COURT: I will let him ask the question about it, but I sustain the objection. This is all public record, of course.

MR. PALMER: The second one relates to an affidacit (sic) by assistant U. S. Attorney Dominic F. Amorosa, filed in the same case of Magnano. His affidavit is dated January 26, 1976. It indicates that a witness had told the Federal prosecutor that Jack Robinson, a narcotics dealer represented by Mr. Gallina -- stated that Robinson had used his lawyer, Mr. Gallina, and his investigators to obtain information necessary to carry out murders against adverse witnesses.



THE COURT: I am going to sustain the objection, the Government's objection to this one. This is all hearsay, isn't it?

MR. PALMER: I think there was a witness --

THE COURT: It's all hearsay, so far as I am concerned.

MR. PALMER: Hearsay during the course of a conspiracy is attributable --

THE COURT: This is not this conspiracy. This is some other conspiracy. No, we will not have a trial on that.

MR. PALMER: We also sought records of the attempts by Federal authorities to enlist the cooperation of Willie Abraham between 12-15-71 and the commencement of his trial --

THE COURT: I think you asked him about that, didn't you?

MR. PALMER: We sought corroboration from the Government.

THE COURT: I know, but this is --

MR. PALMER: Mr. Abraham testified as to those facts, your Honor. The Government obviously has in its files corroboration of his testimony to that effect. That is what we sought under the subpoena: to corroborate his testimony.

THE COURT: The Government has not disputed it. They have not put any testimony in to the contrary, have they?

MR. WEINBERG: That is correct, your Honor.

THE COURT: I don't see any problem with that.

MR. PALMER: Also, in the response to the motion, the Government indicated that it had information that Mr. Abraham had paid fees in this case. I also heard from the attorney that possibly there was a wire tap in which they heard that the fee was in the \$300,000 range.

We asked for information to corroborate Mr. Abraham to this effect, on which Mr. Gallina took the Fifth Amendment, as your Honor recalls, concerning --

THE COURT: I have Mr. Abraham's testimony on that. I don't know what more I really need on it. I have heard -- I realize that Mr. Gallina took the Fifth Amendment on this, but I have Mr. Abraham's testimony. (Tr.II, 173-175)

Mr. Gallina was then recalled for some further questions and his testimony ended on the note that Mr. Abraham still owed him money.

"He owes our law firm \$30,000." (Tr.II, 181)



ARGUMENT

Point I

Appellant Was Prejudiced By Counsel's Conflict of Interest Generated By A Single Law Firm Representing Six Defendants In A Narcotic Conspiracy Case.

"It is settled in this Circuit that some specific instance of prejudice, some real conflict of interest, resulting from a joint representation must be shown to exist before it can be said that an appellant has been denied the effective assistance of counsel." United States v. Carrigan, Docket Nos. 74-2056, 74-2057 (2d Cir., November 3, 1976). Accord, United States v. Mari, 526 F.2d 117 (2d Cir. 1975); United States v. Badalamente, 507 F.2d 12, 20-21 (2d Cir. 1974); United States v. Lovano, 420 F.2d 769, 773 (2d Cir.), cert. denied, 397 U.S. 1071 (1970).

Since the evidence at trial was derived largely from wiretaps and their fruits, it was incumbent upon trial counsel to have sought timely suppression of that evidence on the ground that the minimization requirement had not been complied with by New York City police officers. Cf. CPL §700.30 subd. 7; 18 U.S.C. §2518(5). Such an attack upon the admissibility of the evidence would not have been chimerical, but rather one that struck at nerve-center vulnerability. Indeed, after conducting an extensive post-verdict hearing, Judge Bryan ruled that the three intercepts which produced the 42 calls admitted at trial were administered in a fashion violative of the minimization requirement. Although we are not unmindful that "failure to minimize claims" have not fared well in this



Circuit, see United States v. Cirillo, 499 F.2d 872 (2d Cir.), cert. denied, 419 U.S. 1056 (1974), and cases cited therein, the ruling below on this score would have been entitled to great weight. This is true because all of the calls were automatically recorded all of the time, and at least one of the intercepts which produced 20 of the 42 admitted calls over a two month period was unmanned by officers between eight and twelve hours each day, "but the machines continued to operate in their absence." United States v. Sisca, 361 F.Supp. 735, 742 (S.D.N.Y. 1973). Since minimization can only occur contemporaneous with conversations, there can be no minimization when the capability to so act is absent -- as when discretion is replaced by unmanned ever-functioning recording devices. In addition, one of the key factors normally relied upon to repel lack of minimization claims, is the authorizing judge's continuing supervision of the intercept. United States v. Quintana, 508 F.2d 867, (7th Cir. 1975) (And cases collated therein.)

Such supervision was totally lacking here.

"On all three taps, while each of the orders contained the statutory directions with respect to minimization, no specific instructions appear to have been given to the monitoring agents as to how minimization was to be effected. There is no evidence that any periodic reports were made to the courts issuing the wiretap orders or any supervision of the monitoring process by the court. Nor is there any evidence that the issuing court, during the course of the wiretaps, ever gave consideration as to how minimization could be effected in the light of what developed during the course of the interceptions." United States v. Sisca, 361 F.Supp. at 743.



Even though Judge Bryan held that the minimization requirement had not been complied with, he believed that the 42 calls which fell within the target range of the authorizing orders were, nonetheless, properly admitted at trial. This conclusion is, as we see it, subject to serious legal challenge -- especially when this Court has not yet decided the question.

"It thus becomes unnecessary for us to determine whether a failure adequately to minimize requires suppression of all the conversations overheard, . . . , or only nonincriminating conversations." United States v. Manfredi, 488 F.2d 588, 601 (2d Cir. 1973)

The unique situation posed in United States v. Principie, 531 F.2d 1132 (2d Cir. 1976), did not call for this Court to decide the issue, although the opinion did review three varying judicial remedies imposed for minimization failures. Powerful arguments could be made to the effect that the total abandonment of a minimization effort herein, disemboweled a statutory requirement central to the policy of Title III and converted the authorizations into odious general warrants whose fruits should be totally suppressed. Such unfettered power in the hands of petty officials was aptly condemned by Mr. Justice Brandeis almost 50 years ago:

"Writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wire tapping." Olmstead v. United States, 277 U.S. 438, 476 (1928) (dissenting).



If, as we have demonstrated, such a viable defense was available to Willie Abraham, would not an advocate solely dedicated to protecting his interests have gotten on with the job and filed a timely Motion to suppress after being specifically exhorted by the trial court to do so? We believe that the reason Mr. Gallina did not file such a motion is as obvious as the answer to that question.

Although Mr. Gallina denied being the lead attorney for his firm in representing the six defendants, (Tr.II, 154-155), John Pollock, Esq., a member of the firm at the time of trial, unequivocally testified that Mr. Gallina was the senior partner, had the overall supervision of the case, and was the "lead lawyer" therein. (Tr.II, 82)<sup>8/</sup> Quick perusal of the record also bears this out. It was none other than Mr. Gallina who was the spokesman for the group at the pretrial conference of December 27, 1972, when he urged that "the agents of the police who executed the warrants did not follow the directives of the warrant, did not follow the directive of federal law and that is minimization." United States v. Sisca, 361 F.Supp. at 739. It was the same Mr. Gallina who was directed by the trial court to file a motion pretrial, was given such a prepared motion to file on behalf of all of the defendants by

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<sup>8/</sup> Mr. Pollock's credibility has never been challenged by either side to this litigation.



Mr. Pollock, and who "deliberately failed to raise the claim of failure to minimize in a pretrial motion although specifically directed to do so." United States v. Sisca, 503 F.2d at 1346. It was also Mr. Gallina who solely represented all six defendants before Judge Bryan on November 22, 1972, after the government had raised the conflict of interest problem.

At the trial itself, it was this lead lawyer who solely represented Alphonse Sisca before the jury. The five other defendants were parceled out to other attorneys in the firm -- some of them only two or three days prior to trial. (Tr.II, 77-78) Mr. Gallina -- not without his characteristic hedging -- claimed he first met Mr. Sisca in late 1972. (Tr.II. 114) Mr. Abraham by affidavit and testimony swore that Mr. Gallina stated that it was Mr. Sisca who sent him to see Mr. Abraham at the jail after the latter was arrested on December 15, 1971. If this were not so, it defies all human experience to believe that Mr. Gallina would personally undertake the defense of a stranger he met shortly before the indictment in 72 Cr. 1159, and let one of his underlings represent a man who had paid to him some \$270,000 and who he had already been representing for some ten months. It is, no doubt, because of these factors that Mr. Abraham alleged in his affidavit:

"Although another member of the Gallina firm actually represented me and two others in Court in this case (Mr. Jeffrey Hoffman), I always considered Mr. Gallina to be my lawyer and any time something important came up about the case, I always spoke to Mr. Gallina about it in addition to Mr. Hoffman." (J.A.28)



Furthermore, the evidence at trial revealed that the people at the top of this conspiracy were Alphonse Sisca and one Benjamin Castalozzo who supplied the rest of the chain with drugs. United States v. Sisca, 503 F.2d at 1339. In personally representing Mr. Sisca, Mr. Gallina knew that the case against him was relatively thin and that even if the four tapes alleged to contain his voice were admitted into evidence, Mr. Sisca had an excellent chance of acquittal because of four voice identification experts he had lined up to deny that this was Sisca's voice on the tapes. In addition, the only other damaging evidence against Sisca concerned an outdoor meeting between Sisca, Castalozzo and Abraham, which was to be offset by two lighting experts who analyzed the lighting conditions at the rendezvous point "and expressed their opinion that all three officers observations should be rejected, including particularly the testimony positively identifying Sisca in the passenger seats of both the Abraham and Castalozzo automobiles." Government's brief on appeal at page 12. As it turned out, Mr. Sisca was acquitted on the use of the telephone count but unfortunately for him, that did not have the anticipated spill-over effect on the conspiracy count. On the other hand, once the 42 tapes and their fruits were admitted into evidence, Mr. Abraham was as good as convicted along with the four other defendants



represented by the Gallina firm. The only person who could have benefited or, at the very least, not have had his defense jeopardized by a tactical decision to file the minimization motion after the trial commenced, was Alphonse Sisca. If the motion were granted, the government would have been precluded from appealing the issue and a major part of its case would have been eliminated. However, by purposely filing a late motion and gambling that it would not be denied on procedural grounds, Mr. Sisca was in the enviable position of still being able to earnestly contest the government's case should the gamble be lost -- an enviable position not to be shared by Mr. Abraham. Thus, Mr. Sisca was the only person on whose behalf these "deliberate and subtly disruptive tactics"<sup>9/</sup> could have been employed. Mr. Abraham's best interests could only have been served by filing that motion in timely fashion. The result is, that because of this joint representation, a serious conflict of interest concerning trial strategy developed which destroyed Mr. Abraham's defense. The prejudice thus engendered was sealed when this Court affirmed the trial court's ruling:

"We hold. . . that appellants knowingly and intentionally waived their rights to challenge the admissibility of the wiretap evidence. . . ." <sup>10/</sup>

<sup>9/</sup> United States v. Sisca, 503 F.2d at 1349.

<sup>10/</sup> Id., at 1346.



United States v. Olsen, 453 F.2d 612 (2d Cir. 1972) is, a fortiori, support for a finding of prejudice herein. In that case three defendants were jointly represented by one attorney. This Court reversed Olsen's conviction because, on the critical issue of probable cause, counsel did not as strongly pursue the invalidity of Olsen's arrest as he did with his other two clients and thus, the Court was forced to conclude that "Olsen may have been prejudiced by the joint representation." 453 F.2d at 616. See also United States ex rel. Hart v. Davenport, 478 F.2d 203 (3d Cir. 1973).

Furthermore, Mr. Abraham's testimony to the effect that government agents continuously and seriously sought his cooperation was conceded below. (Tr.II, 174-175) Two apparent targets of these investigators were Alphonse Sisca and Gino Gallina. (Tr.II, 14) As a dutiful client, Mr. Abraham told Mr. Gallina about these overtures to have him inform, and Mr. Gallina advised him to string the government along. In any criminal case an important aspect of counsel's task is plea bargaining -- especially when a defendant faces life imprisonment. Law enforcement officers had already mentioned substantially reduced penalties for Mr. Abraham should he cooperate with them. This entire method of penalty reduction was effectively eliminated for Mr. Abraham, however, because of the joint representation. Mr. Gallina was in the untenable



position of giving deceitful advice to Mr. Abraham in order to protect another client, and more importantly perhaps, to protect himself from prosecutorial scrutiny. At that point, there was not only a conflict of interest between two clients, but a total breakdown of effective representation because of the head on collision between attorney and client. Being on notice of these facts, Mr. Gallina was obligated, we submit, to voluntarily withdraw from this multiple representation. Failure to do so is but another indicia that Mr. Abraham "[must] have been prejudiced by the joint representation." United States v. Olsen, supra.

"The Sixth Amendment's guarantee of Assistance of Counsel necessarily requires that a criminal defendant be represented not only by counsel satisfying at lease a minimum standard of professional competency, . . . but also by counsel whose undivided loyalties lie with his client.... Such representation is lacking if counsel, unknown to the accused and without his knowledgeable assent, is in a duplicitous position where his full talents as a vigorous advocate having the single aim of acquittal by all means fair and honorable are hobbled or fettered or restrained by commitments to others." United States ex rel. Robinson v. Housewright, 525 F. 2d 988, 992 (7th Cir. 1972)

## Point II

Appellant Did Not Effectively Waive His Right To Be Represented by Unbiased Counsel.

- A. Assuming arguendo that Mr. Abraham's waiver of the conflict of interest on November 22, 1972, was facially valid, it was nonetheless involuntary as a matter of law.

After the evidence was taken on May 25, 1976, present counsel for Mr. Abraham filed a Memorandum And Proposed Findings



of Fact, which led off with a frontal assault on Mr. Gallina's credibility, i.e.,

"Gina Gallina, Esq., is not what one would characterize as a truth telling person."  
(J.A.55)

In support of that assertion we cited transcript references similar to the ones in the instant brief. In reply, the government filed a Memorandum Of Law In Opposition To Petitioners' Motions To Vacate Their Sentences. (J.A.64-79) The entire thrust of that memorandum was that the hearing on November 22, 1972, conclusively established a waiver herein as a matter of law. Nowhere in that lengthy memorandum did the government meet our challenge and seek to affirmatively support Mr. Gallina's credibility or dispute our assertions relative to his lack of it. The sole reference in the text to the testimony taken on May 25, 1976, was as follows:

"At a hearing the defendant claimed that his attorney had not discussed a possible conflict of interest. This was contradicted by the attorney\*."

A footnote was then dropped and Mr. Gallina's testimony and portions of Mr. Pollock's were scantily summarized. (J.A.70-71)

Our reply memorandum pinpointed the government's position on this:

"With understandable reluctance, the government has declined to pick up the gauntlet raised by our four-square attack upon Mr. Gallina's credibility."  
(J.A.80)



We therefore conclude that based upon this most unusual record concerning counsel, and for other reasons contained in the investigative files of the United States Attorney, the government -- in good faith -- declined to rely upon Mr. Gallina in sustaining its position below. We assume that that posture will carry through to this Court.<sup>11/</sup>

Judge Bonsal's memorandum opinion, as we read it, reflected the government's position on credibility. His opinion is also grounded in the theory that the purported waiver effected before Judge Bryan foreclosed Mr. Abraham from a later successful collateral attack upon his conviction. (J.A. 87-97). Judge Bonsal purposely abstained from getting involved with issues of credibility as revealed by his summary of the May 25, 1976, testimony. In it, he did not even allude to the divergent postures of the witnesses. His sole reference to Mr. Abraham's and Erroll Holder's testimony is as follows:

"Petitioners Abraham and Holder testified that they, along with petitioners Grant and Hoke, attended a meeting with Mr. Gallina on the morning of November 22, 1972 at which time Mr. Gallina informed them of a hearing to be held later that morning on the Government's motion for a hearing to resolve possible conflict of interest questions." (Tr. 5/25/76 at 26-28) (J.A.94)

<sup>11/</sup> Should we be in error on this and now find a more vigorous support for Mr. Gallina in the face of, perhaps, rougher going, then serious questions would be raised relative to the denial of our request for Brady material with which to cross examine Mr. Gallina. (Tr.II, 176-177) However, since we do not really expect a change in position, there is no need to presently press for relief. See United States v. Morell, 524 F.2d 550 (2d Cir. 1975)

Furthermore, the district court's response to our claims of prejudice also reflect his view that the hearing before Judge Bryan foreclosed any attack upon the waiver at a later time:

"As to the alleged claims of prejudice arising from the failure to file a timely minimization motion, the Court finds that this issue was fully explored on appeal, . . . , that the decision not to file a pre-trial minimization motion was a deliberate trial tactic, and that further discussion of this issue is not warranted here." (J.A.96-97) (Citation omitted.)

We believe that cases dealing with collateral attacks upon guilty pleas entered pursuant to Rule 11, Federal Rules of Criminal Procedure, are persuasive on whether a conflict of interest waiver can be overturned for involuntariness. It is generally held that a Rule 11 plea must survive a collateral attack unless the defendant "offers a valid reason why he should be permitted to depart from the apparent truth of his earlier statement." Crawford v. United States 519 F.2d 347 (4th Cir. 1975). The importunings of counsel provide such a valid reason. Mosher v. Lavellee, 491 F.2d 1346 (2d Cir. 1974); United States v. Simpson, 436 F.2d 162 (D.C. Cir. 1970).

"A pre-sentencing colloquy between a trial judge and defendant, of the type 'conclusively' relied upon by the district court here, is 'evidential on the issue of voluntariness. . . not conclusive.'" Trotter v. United States, 359 F.2d 419, 420 (2d Cir. 1966)



In the case at bar, Willie Abraham sought to remain with the Gallina firm on November 22, 1972, because he was directed to answer the questions as he did by Mr. Gallina. In consequence of the latter's statements to him he can be deemed -- on an objective standard -- to have been frightened into giving those answers lest he go to jail because of the government's alleged chicanery. Furthermore, Mr. Abraham was told by the federal authorities that if he agreed to cooperate with them, he would have to leave the Gallina firm because "[t]hey were afraid that if Mr. Gallina found out that I was an informer, there might be danger to me and my family." (Tr.II, 22-23) Mr. Abraham did not doubt the compelling nature of this advice, having in mind the example of Mr. Coombs who left the Gallina firm under the cloud of being a suspected informer and who, shortly thereafter, was killed. (Tr.II,23) This was apparently a difficult law firm to disassociate from. In these circumstances, it is fair to say that the government itself provided Mr. Abraham with substantial impetus to follow Mr. Gallina's advice and give those answers which would not sever him from counsel. This very problem was augured by Assistant United States Attorney W. Cullen MacDonald in 1972, when he first raised the conflict of interest question before Judge Bryan:

"It would seem self-evident, that the relatively more severe penalties in narcotics cases would tend to enhance the ever present intra-intimidation between co-conspirators to maintain the silent integrity of the conspiracy. And, all too frequently, violent means are employed by the leaders at the top of the narcotics distribution chain." (J.A. 43)



It is for these reasons which we believe are borne out by the record that we urge, assuming arguendo the facial validity of the conflict of interest waiver on November 22, 1972, that that waiver was nonetheless involuntary and the very work product of a lawyer enmeshed in a duplicitous position.<sup>12/</sup>

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<sup>12/</sup> To meet this contention, the government offered the following post-hearing argument below:

"To characterize Judge Bryan's hearing as a 'charade' as petitioners have done is to cast in doubt the validity of numerous hearings trial judges regularly conduct to insure that a defendant has knowingly waived a constitutional right. Granting the writ of habeas corpus in the instant case would invite all defendants who make the strategic choice to participate in a joint and coordinated defense to attack collaterally that decision when the stratagem fails and the defendant is convicted." (J.A. 78.)

The short of it is, that all such proceedings have always been subject to collateral attack on the theory we have advanced. However, the paucity of cases raising that specific claim in this Circuit suggests that hordes of defendants are not rushing down to the courthouse to make reckless contentions they would have to back up testimonially. The government sought to have the Court tolerate manifestly improper conduct by counsel such as this unusual record suggests, else the forever anticipated "flood of litigation" will do us all in. It is our experience, however, that such in terrorem arguments can rarely shoulder their intended burdens. If the petitions increase somewhat, so be it; perhaps there are other egregious cases in need of redress -- certainly this one is.



- B. Under the extant circumstances, the purported waiver before Judge Bryan was invalid on its face.

It is apparent that cases alleging or involving impairment of the right to the effective assistance of counsel because of joint representation -- including the instant one -- are moving apace in this Circuit. Cf. e.g., United States v. Carrigan, Nos. 74-2056, 74-2057 (2d Cir. November 3, 1976); United States v. Mari, 526 F.2d 117 (2d Cir. 1975); United States v. Arredo-Sarmiento, 524 F.2d 591 (2d Cir. 1975); United States v. Badalamente, 507 F.2d 12 (2d Cir. 1974); United States v. DeBerry, 487 F.2d 448 (2d Cir. 1973).

In the absence of adoption of a rule to solve this persistent problem as was suggested by Judge Lumbard concurring in United States v. Carrigan, supra, we must ask this Court to look once again at whether or not the waiver below by a defendant was adequate, in the circumstances presented. While prior waiver cases are instructive, they are not determinative because of the varying factual milieus in which they arise. Compare United States v. Sheiner, 410 F.2d 337 (2d Cir. 1969) (Valid: Defendant consulted two other attorneys prior thereto); with United States v. DeBerry, supra, (Invalid: no personal interrogation by the Court). See also United States v. Alberti, 470 F.2d 878 (2d Cir. 1972); United States v. Vowteras, 500 F.2d 1210 (2d Cir. 1974); United States v.



Wisniewski, 478 F.2d 274 (2d Cir. 1973). While no particular manner of proceeding at a waiver hearing has been suggested by this Court because, no doubt, of the varying contexts in which the issue arises, indications are that nothing less than a meaningful and careful inquiry will do:

"The defendant should be fully advised by the trial court of the facts underlying the potential conflict and be given the opportunity to express his views." United States v. Carrigan, supra.

"The district judge should fully explain to Arredo and Gill the nature of the conflict, the disabilities which it may place on Kassner & Detsky [attorneys] in their conduct of appellant's defense, and the nature of the potential claims which appellants will be waiving should they choose to proceed with these attorneys." United States v. Arredo-Sariento, supra, at 593.

"[I]t should be only after the most searching inquiry on the part of the court and in those exceptional circumstances where a conflict is not within the realms of reasonable foreseeability that dual representation by defense counsel should be permitted." United States v. Mari, supra. (Judge Oakes concurring.)

Furthermore, this Court has alluded favorably to the most exhaustive analysis we have found dealing with the waiver issue. I.e, in United States v. Arredo-Sarmiento, supra, the case of United States v. Garcia, 517 F.2d, 272 (5th Cir. 1975), was cited as "a well-reasoned opinion." The relevant portion of Garcia is as follows:

"Because of the unchallenged importance of the need for adequate representation during criminal proceedings, we direct the District Court to scrupulously evaluate the insistence of the defendants on the right to privately retain counsel of their own choice even though the district court may discern a conflict of interest in such representation. In addition, the court



must also carefully evaluate the persistent efforts of the defendants to waive any imperfections in such representation which may be apparent to the court. The trial court should actively participate in the waiver decision....

The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included...and all other facts essential to a broad understanding of the whole matter....

As in Rule 11 procedures, the district court should address each defendant personally and forthrightly advise him of the potential dangers of representation by counsel with a conflict of interest. The defendant must be at liberty to question the district court as to the nature and consequences of his legal representation. Most significantly, the court should seek to elicit a narrative response from each defendant that he has been advised of his right to effective representation, that he understands the details of his attorney's possible conflict of interest and the potential perils of such a conflict, that he has discussed the matter with his attorney or if he wishes with outside counsel, and that he voluntarily waives his Sixth Amendment protections....

Mere assent in response to a series of questions from the bench may in some circumstances constitute an adequate waiver but the Court should nonetheless endeavor to have each defendant personally articulate in detail his intent to forego this significant constitutional protection."

Measured by this standard we believe that the inquiry here fell short of its intended goal. In limine, we would indicate that the government, in raising the issue before Judge Bryan, did so without pointing to any specific problem it then perceived. The very nature of the case caused it



to urge in its memorandum, however:

"The Government respectfully submits that there is every reason to believe that the interests of the six defendants are sufficiently varying as to require a finding that a conflict of interest is present in their joint representation." (J.A.45)

Furthermore, because of the structure of the alleged conspiracy and the internal control factor normally present therein, the government additionally cautioned:

"It would seem that the only way that a valid waiver could be forthcoming is for independent counsel, perhaps in the nature of appointed amicus curae\*, to advise each of the six defendants concerning their respective waiver decisions. \*Judge Motley recently appointed Murray Mogel, Esq. in such a capacity in United States v. Christopher Warren, (S.D.N.Y.)" (J.A.46)

At the hearing itself, that course was not followed after Mr. Gallina went into a tirade about how the government had continually sought to separate the defendants from counsel and the persistent efforts to have Mr. Abraham cooperate with the prosecution. (Tr.I, 14-16, 19-22)

He asserted to Judge Bryan:

"It is a very weak case with very little evidence against certain defendants and they feel that if they can divide the defendants they may be able to perfect their case through cooperation from certain defendants". (Tr.I, 16) They feel the only way to win it is to divide the defendants." <sup>13/</sup>  
(Tr.I, 22)

<sup>13/</sup> One reason the government kept pressing for cooperation from Mr. Abraham, might have been its awareness that the wiretap was in serious trouble on minimization grounds.



Thus, the district court was affirmatively put on notice of the basis upon which a real conflict of interest between defendants could presently exist. This was especially true in the case of Willie Abraham:

"One refrain that was continually pointed at Mr. Abraham's head -- they had months and months of visiting in the Bronx House of Detention and while he was at West Street -- 'We will get you an attorney; we will get you an attorney'." (Mr. Gallina to Judge Bryan) (Tr.I, 21.)

Government trial counsel also obliquely alluded to this method of penalty reduction in one of his two conflict of interest pleadings:

"In advance of trial, each of these six defendants will decide whether or not to forego trial by pleading guilty to all or part of the indictment. Since the maximum possible punishment under the three counts of the indictment varies so considerably, from a low of four years incarceration on count three, to fifteen years on count one, and to life imprisonment on count two, [Willie Abraham was the only person charged with this life count] that decision ought to be free of any possible imperfections of advice resulting from conflicting loyalties." (J.A.50)

In these circumstances, we believe it was incumbent upon the trial court to have conducted a searching inquiry as to this reasonably foreseeable basis for a conflict between defendants. However, this one visible underlying cause for a potential conflict of interest was never explored by Judge Bryan. The entire colloquy between the court and Mr. Abraham was in the abstract, with no meaningful



narrative dialogue between the two. Accordingly, in light of the clearly apparent factual nexus to a real conflict between defendants and the absence of any interrogation by the trial court concerning it, we urge that the waiver proceeding as to Mr. Abraham was legally defective at that time.<sup>14/</sup>

### Point III

Even If The Waiver Of November 22, 1972, Was Valid,  
The Later Accruing Prejudice to Appellant Rendered  
It Of No Legal Moment.

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As Judge Lumbard so recently observed:

"It would be a rare defendant who could intelligently decide whether his interests will be properly served by counsel who also represents another defendant. However parallel his interests may seem to be with those of a codefendant the course of events in the prosecution of the case,...., may radically change the situation so as to impair the ability of counsel to represent the defendant most effectively.

\* \* \* \*

It follows that there will be cases where the court should require separate counsel to represent certain defendants despite the expressed wishes of such defendants. Indeed, failure of

<sup>14/</sup> Appellant has not always been alone in this assertion. At the conclusion of the waiver hearing itself, government counsel who had raised the issue before Judge Bryan, was of the view that an effective waiver of the conflict of interest claim had not yet been accomplished. (Tr.I, 37-41)

"Mr. MacDonald: If I can be responsive and make a preliminary generalizing remark, Your Honor, although it is clear that from the general principles each defendant this morning has apparently understood



the trial court to require separate representation may, in cases such as this, require a new trial, even though the defendants have expressed a desire to continue with the same counsel." United States v. Carrigan, supra. (concurring opinion.)

This Court had earlier expressed the same view in United States v. Vowteras, supra. In that case a valid waiver was deemed to have occurred but notwithstanding that waiver, it was suggested that the defendants "cannot now repudiate their choice in the absence of a credible showing of some specific instance of prejudice, some real conflict of interest, resulting from a joint representation." 500 F.2d at 1211.

As we see it, whatever its validity at the time, the generalized waiver before Judge Bryan could not operate to bar a subsequent claim of ineffective assistance of counsel

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14/ (cont'd.)

the possibilities and probabilities as your Honor has very carefully outlined it to them and has made a general decision, the government's position is that unless and until each defendant has made a full and knowing disclosure to a trained partisan advocate who is going to analyze the evidence in that disclosure and then analyze the government's case as is apparent from the indictment and discovery, and from whatever other methods counsel has including the conversations with our office, and then renders an informed judgment, [there can be no valid waiver]." (Tr.I, 37-38) (Emphasis supplied.) Government counsel was in the obvious bind of being able to reveal factors bearing on waiver to independent counsel which he did not want to reveal to Mr. Gallina.



based upon a later arising prejudicial conflict of interest. Certainly, the purposeful failure of Mr. Gallina to file a timely minimization motion on Mr. Abraham's behalf because of that conflict was sufficient prejudice to avoid the earlier waiver. This was a prejudice which was not, nor could it have been, foreseen on November 22, 1972. It would be unfair to hold petitioner-appellant responsible for the conduct of an attorney ostensibly acting in his behalf, but who was prevented from doing so because of his divided loyalties. Furthermore, the situation was actually far worse as the record demonstrates. Long before trial, Mr. Abraham had been told by Mr. Gallina that the latter believed that "there was no minimization on the wiretap, and he felt that he could beat it. . . ." (Tr.II, 26). This was buttressed by the testimony of John Pollock, Esq., who stated that a minimization motion had been prepared and given to Mr. Gallina for pretrial filing and that he had told the defendants 2 or 3 days prior to the trial that that motion had been filed with the court. (Tr.II, 103) Thus, the full protection of Mr. Abraham's rights which he reasonably assumed had been undertaken, soon crumbled when Mr. Gallina forsook his interests for those of another client. No waiver could survive this assault upon its underpinnings.



Furthermore, with these assurances that the pleadings had been timely filed -- as the record now unequivocally reflects -- it was extremely hard for Mr. Abraham to accept the notion that he "knowingly and intentionally" had waived his right to challenge the admissibility of that wiretap evidence because the minimization motion had not, in fact, been timely filed pursuant to directions.<sup>15/</sup>  
United States v. Sisca, 503 F.2d at 1346.

To urge, on this record, that Mr. Abraham waived his rights to effective representation in January of 1973, on the basis of what transpired on November 22, 1972, would run counter, we submit, to generally accepted notions of reality.<sup>16/</sup>

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<sup>15/</sup> As we suggested to the Court below, (J.A.84-86), on these facts counsel's failure to file that motion, standing alone, was a deprivation of his right to the effective assistance of counsel. United States v. Easter, 539 F.2d, 633 (8th Cir. 1976).

<sup>16/</sup> Although this argument contained in Point III on appeal, was urged below, (J.A. 21-22, 61-62), neither the government nor the district court ever responded to it. Being timely raised, however, it is now ripe for review.

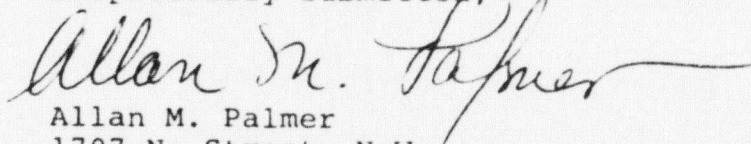
"The right to effective representation by counsel whose loyalty is undivided is so paramount in the proper administration of criminal justice that it must in some cases take precedence over all other considerations, including the expressed preference of the defendants concerned and their attorney." United States v. Carrigan, supra. (concurring opinion.)

The collateral proceeding was brought below to provide the defendant with the untainted trial representation secured to him under the Sixth Amendment which, so far, has eluded him.

#### CONCLUSION

The judgment below should be reversed with directions to the trial court to vacate appellant's sentence in 72 Cr. 1159 and grant him a new trial.

Respectfully submitted,

A handwritten signature in cursive script, reading "Allan M. Palmer", followed by a long horizontal flourish.

Allan M. Palmer  
1707 N. Street, N.W.  
Washington, D. C. 20036  
Counsel for Appellant

Morton Katz  
of Counsel



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ROBERT B. FISKE JR.  
U.S. ATTORNEY  
SO. DIST. OF N.Y.